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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1975
No. 75-280

DONALD L. WASHUM, an Individual, HAYWOOD L. WASHUM, d/b/a LOS ANGELES-YUMA FREIGHT LINES, INC., SVENSSON FREIGHT LINES, INC.,
Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, MILNE TRUCK LINES, INC., NAVAJO FREIGHT LINES, INC., O-N-C FREIGHT SYSTEM, THUNDERBIRD FREIGHT LINES, and WESTERN GILLETTE, INC.,
Appellees.

On Appeal From the United States District Court for the District of Arizona.

MOTION TO AFFIRM.

R. Y. SCHUREMAN,
1545 Wilshire Boulevard,
Los Angeles, Calif. 90017,
Attorneys for Appellees, Milne Truck Lines, Inc., Navajo Freight Lines, Inc., O-N-C Freight System, Thunderbird Freight Lines and Western Gillette, Inc.

Of Counsel:
RUSSELL & SCHUREMAN,
1545 Wilshire Boulevard,
Los Angeles, Calif. 90017.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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IN THE

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October Term, 1975
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DONALD L. WASHUM, an Individual, HAYWOOD L. WASHUM, d/b/a LOS ANGELES-YUMA FREIGHT LINES, INC., SVENSSON FREIGHT LINES, INC.,

Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, MILNE TRUCK LINES, INC., NAVAJO FREIGHT LINES, INC., O-N-C FREIGHT SYSTEM, THUNDERBIRD FREIGHT LINES, and WESTERN GILLETTE, INC.,

Appellees.

On Appeal From the United States District Court for the District of Arizona.

MOTION TO AFFIRM.

1. Motion.

Appellees Milne Truck Lines, Inc., Navajo Freight Lines, Inc., O-N-C Freight System, Thunderbird Freight Lines and Western Gillette, Inc. hereby move that the judgment of the District Court be affirmed.

2. Ground for Motion.

This motion to affirm is made pursuant to the provisions of Rule 16.1 (c) of the Revised Rules of the Supreme Court of the United States (1970), as amended, and is made on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

3. Statement.

This matter involves a direct appeal from a 3-judge District Court, pursuant to 28 U.S.C. §§1253 and 2101(b). The District Court's opinion is reproduced as Appendix A to the Jurisdictional Statement [J.S.].[1]

The proceedings below involved two consolidated cases. The first, No. Civ 74-450, was commenced by appellants against appellees United States of America and Interstate Commerce Commission [Commission] to enjoin, annul and set aside certain orders of the Commission which are reproduced as J.S., Appendices B and C. The second action, No. Civ 75-110 was commenced by appellants against the United States of America and the Commission to enjoin, annul and set aside a subsequent order of the Commission in the same proceedings denying a petition for rehearing, which petition had been filed by appellants after the commencement of action No. Civ 74-450. These appellees intervened as defendants in both actions. Although appellants' claims for relief were denied in both cases, their appeal is directed to the District Court's opinion only insofar as it pertains to Action No. Civ 74-450.

[1]Terms in brackets indicate abbreviations used herein.

The historical background of the case is adequately summarized by the District Court (J.S., App. A, pp. 2a-4a) and by the Commission (J.S., App. B, pp. 1b-4b) and will be alluded to here only briefly in order to avoid prolixity.

The proceedings before the Commission involved two applications, one pursuant to Section 5 of the Interstate Commerce Act [Act] (49 U.S.C. §5) for the acquisition by Donald L. Washum, president and sole shareholder of Svensson Freight Lines [Svensson] of control of Haywood L. Washum, doing business as Los Angeles-Yuma Freight Lines [Section 5 application], and the other pursuant to Section 207[2] (49 U.S.C. §307) by Svensson for a certificate of public convenience and necessity authorizing transportation of property in interstate and foreign commerce by motor vehicle between Yuma and Phoenix, Arizona over U.S. Highway 80 serving all intermediate and certain off-route points [Section 207 application]. Los Angeles-Yuma Freight Lines [LAY], as the name suggests, holds a certificate of public convenience and necessity issued by the Commission authorizing transportation of property by motor vehicle in interstate and foreign commerce between Los Angeles, California and Yuma, Arizona. A grant of the applications, therefore, would have permitted the appellants to provide a through service between Los Angeles, California and Phoenix, Arizona in direct competition with the services offered by these appellees. By its report and order of October 17, 1972, *Donald L. Washum—Control—Haywood Washum*, 116 M.C.C. 158 (J.S., App. B) the Commission

[2]Unless otherwise indicated, all references are to the Interstate Commerce Act.

denied the Section 207 application on the basis of (a) a lack of fitness on the part of appellant Svensson and (b) failure of appellants to establish that the public convenience and necessity required a grant of the application.[3]

The Commission also denied the Section 5 application on the basis that denial of the Section 207 application would result in Svensson's not being a certificated interstate carrier, so that no authority from the Commission for control of LAY would be required.

Appellants filed with the Commission petitions seeking reconsideration of its said order and for further oral argument, receipt of additional evidence and/or hearing. The additional evidence consisted of a traffic study of operations conducted by Svensson purportedly pursuant to temporary operating authority granted by the Commission under Section 210a (a) (49 U.S.C. §310a (a)) (J.S., App. F, p. 3f). The Commission, by its Corrected Order dated April 30, 1974 (J.S., App. C) granted the petition for the limited purpose of accepting and admitting into the record the tendered traffic study but otherwise denied the petition and further denied the petition seeking reconsideration.

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[3]Section 207 provides in pertinent part as follows:

> "Subject to Section 210 [49 U.S.C. §310], a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part [Title 49 U.S.C., Chapter 8] and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. . . ."

Both elements ((a) fitness and (b) public convenience and necessity) must be established by an applicant in order to qualify for a certificate. *Zuzich Truck Line, Inc. v. United States,* 224 F. Supp. 457 (D. Kan. 1963).

In a prior proceeding in 1968, *Svensson Freight Lines —Purchase—Haywood Washum,* 104 M.C.C. 838. The Commission found, among other things, that a certificate of registration issued to Svensson on June 10, 1964 under Section 206(a) (7) (A) (49 U.S.C. §306(a) (7)(A)) had been improvidently issued and invalid since that date (J.S., App. E, p. 3e). Appellants thereafter brought an action in the United States District Court for the District of Arizona to enjoin, annul and set aside the commission's order. the 3-judge court in that matter dismissed the complaint, *Washum v. United States,* 299 F. Supp. 712 (D. Ariz. 1969) (J.S., App. D), and this Court affirmed the judgment *per curiam,* 396 U.S. 18 (1969). Among other matters considered by the Commission in its 1972 decision in determining lack of fitness on the part of appellant Svensson was the fact that, following affirmance by this court on October 27, 1969 of the District Court's 1969 judgment, Svensson continued to conduct operations until January 15, 1970[4] without authority from the Commission (its certificate of registration being invalid) and despite the advice of counsel to the contrary (J.S., App. B, p. 5b).

As one of their three grounds for seeking reversal of the District Court's judgment, appellants contend that the Commission was without power to declare Svensson's certificate of registration void without having followed the procedures established by Section 212 (a) (49 U.S.C. §312 (a)) (J.S., App. F, pp. 3f-4f), and that therefore the Commission's finding in its 1972 decision of Svensson's unfitness, to the extent it was based upon unauthorized operations conducted by Svensson following this Court's *per curiam* decision of Octo-

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[4]On that date the Commission granted Svensson temporary authority under Section 210a(a).

ber 27, 1969, was improper. That is, appellants are here undertaking to collaterally attack the Commission's 1968 decision which was affirmed by both the District Court and this Court.

Appellants also contend that the District Court improperly applied the doctrines of *res judicata* and collateral estoppel and that there is a conflict between the District Court's decision and a decision of a District Court in Minnesota.

None of the three contentions raised by appellants presents a substantial question which justifies further argument before this court.

4. Argument.

4.1. The Commission's Action in Its 1968 Decision, as Affirmed by the District Court and This Court, Finding That Svensson's Certificate of Registration Was Improvidently Issued and Thereby Invalid, Was Well Within the Jurisdiction and Power of the Commission.

Section 206(a)(7)(A) (49 U.S.C. §306(a)(7)(A)) (J.S., App. F., p. 1f) provides that the Commission shall issue a certificate of registration to any person who on October 15, 1962 was in operation solely within a single state as a common carrier by motor vehicle in intrastate commerce, excluding persons controlled by, controlling, or under common control with, a carrier engaged in operations outside such state, and who or which was also lawfully engaged in such operations in interstate or foreign commerce under the certificate exemption provision of the former second proviso of paragraph (1) of said subsection (a)

as in effect immediately before October 15, 1962,[5] authorizing the continuance of such transportation in interstate and foreign commerce upon application for and proof of such operations. Thus, the existence of the proscribed common-control relationship on October 15, 1962, or the absence of lawful operations under the former second proviso because of such common control relationship, renders a single-state carrier ineligible to receive a certificate of registration. *Homer White, Inc. v. United States,* 281 F. Supp. 436 (D.N.Y. 1968).

The Commission found in 1968 that as of October 15, 1962, Svensson was under common control with LAY, that prior to October 15, 1962 Svensson had not been operating lawfully under the former second proviso because of its common control relationship with LAY and that, therefore, the certificate of registration issued to Svensson on June 10, 1964 had been issued improvidently and was void *ab initio.*

As recognized by appellants (J.S., p. 8) the Commission has the power and the duty to declare invalid certificates which are issued as a result of ministerial error, fraud, misrepresentation, mistake, or inadvertence, that is, to take corrective action where there has been an obvious injustice. Section 17(3) (49 U.S.C. §17(3)); *American Trucking Associations v.*

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[5]The former second proviso read as follows:

"And provided further, That this paragraph shall not be so construed as to require any such carrier lawfully engaged in operation solely within any State to obtain from the Commission a certificate authorizing the transportation by such carrier of passengers or property in interstate or foreign commerce between places within such State if there be a board in such State having authority to grant or approve such certificate and if such carrier has obtained such certificate from such board. Such transportation shall, however, be otherwise subject to the jurisdiction of the Commission under this part."

Frisco Transp. Co., 358 U.S. 133, 145-146, 3 L. Ed. 2d 172, 79 S. Ct. 170 (1958); *Carl Subler Trucking v. United States,* 313 F. Supp. 971, 976 (S.D. Ohio 1970); *Smith Bros. Revocation of Certificate,* 33 M.C.C. 465 (1942), 42 M.C.C. 211 (1943).

In an apparent effort to dispel the notion that the Svensson certificate of registration was not issued as the result of any of the listed causes, appellants urge (J.S., pp. 4, 9) that the Commission and the District Court overlooked the fact that Svensson's application for the certificate or registration revealed that Svensson and LAY shared a terminal and equipment. Of course, the record of the Commission proceedings which resulted in its 1968 decision was not before the Court in the action which is the subject of the instant appeal. However, subsequent to oral argument in the court below, counsel for appellants submitted to the District Court a certified copy of Svensson's application for a certificate of registration which was filed with the Commission in February 1963, which was signed and verified by appellant Donald L. Washum. Paragraph V(b) of the application form inquires whether the applicant has any contract, lease, or arrangement for the joint use of offices, garages, motor vehicles or other facilities, or any other arrangement with any other transportation company or any person connected with such company and, if answered affirmatively, requires a full explanation on a separate sheet attached as Appendix "E" to the application. On Svensson's application the question was answered "yes", and Appendix "E" thereto stated in its entirety is as follows:

"Appendix 'E'

"1. Lease office space and dock facility in conjunction with L A Yuma Freight Lines in Yuma, Arizona. Leased on monthly basis.

"2. Occasional used (sic) of power equipment & trailers. Leased on mileage basis."

What appellants themselves overlook is the fact that Paragraph V(a) of the application, which reads "State whether the applicant, or any of applicant's stockholders, or any person named in Appendix 'A' is directly or indirectly affiliated with, in control of or under common control with any other carrier or carriers subject to the Interstate Commerce Act. (yes or no)," is answered "No." Appellants also overlook the facts upon which the Commission in 1968 based its finding and conclusion of the existence of common control, as set forth at 104 M.C.C. 848-851, reproduced as the Appendix hereto.

In *Reliance Truck Co.—Control and Merger,* 109 M.C.C. 495 (1970) the Commission made the following observation:

> "As distinguished from the situation here to be considered, the circumstances in the *Washum* case [104 M.C.C. 838] fully established that the carriers therein had been in violation of Section 5 (4), and had been unlawfully under common control continuously since July 1957. It was further established in the *Washum* case that when, in 1963, issuance of a certificate of registration to Svensson Freight Lines was sought, and prior thereto, on or about September 17, 1962, when the Washums were involved in a transfer proceeding, their common control, interests and affiliations had been deliberately concealed." (109 M.C.C. at 500.)

Manifestly, under these circumstances the Commission validly exercised its power to declare the Svensson certificate of registration void *ab initio*.

The cases cited and relied upon by appellants for the proposition that the Commission exceeded its power in so doing are clearly distinguishable. In *Castle v. Hughes,* 348 U.S. 61, 99 L. Ed. 68, 75 S. Ct. 191 (1954) the State of Illinois sought to enforce a statute suspending a carrier from use of the state highways because of repeated overweight violations. The Illinois Supreme Court held that the statute could not be enforced with respect to interstate traffic. This Court affirmed, holding that only the Commission has the power to suspend interstate operations of a carrier.

In *Civil Aeronautics Board v. Delta Airlines,* 367 U.S. 316, 6 L. Ed. 2d 869, 81 S. Ct. 1611 (1961) the Board issued a certificate, which became effective. Thereafter, on reconsideration, the Board attempted to insert restrictions without further hearings, which this Court held to be improper. There was no issue as to the validity of the certificate in the first instance.

United States v. Seatrain Lines, 329 U.S. 424, 91 L. Ed. 396, 67 S. Ct. 435 (1947) involved an attempt by the Commission to modify a certificate as a result of a change in the Commission's policy. The Court did not get to the question of the power of the Commission to correct mistakes in certificates of public convenience and necessity, because all the requisite information had been disclosed in the "grandfather" application involved, and there could have been no inadvertence on the part of the Commission in issuing the certificate.

Watson Bros. Transportation Company v. United States, 132 F. Supp. 905 (D. Neb. 1955), Aff'd. 350 U.S. 927 (1956), was decided prior to and, it is submitted, conflicts with the holding of this Court in *American Trucking Associations v. Frisco Transp. Co., supra,* 358 U.S. 133 (1958) with respect to the Commission's power to invalidate inadvertently issued certificates. As the dissent in the *Watson Bros.* case correctly points out, Section 212 (a) logically can have application only to lawfully issued certificates.

Perhaps the key to distinguishing between circumstances where the procedures established under Section 212 (a) are applicable and when they are not is best stated by the Commission in another case cited by appellants, *All American Transport, Inc.—Control and Merger,* 109 M.C.C. 243 (1969), namely, that "the registration holder should be given the opportunity to demonstrate or achieve compliance prior to such termination or revocation." (109 M.C.C. at 249).

Patently, where a certificate of registration has been validly issued to a single-state carrier under Section 206(a)(7)(A), and thereafter that carrier enters into a common control relationship with a carrier engaged in operation outside such state, the procedures established under Section 212 (a) would give the single-state carrier an opportunity to divest itself of the unlawful common control relationship. However, where, as here, the common control relationship (concealed from the Commission) existed on the critical date, October 15, 1962, and Svensson was not operating lawfully under the former second proviso of Section 206 (a)(1) immediately prior to that date, the requisites for the issuance of a certificate of registration to Svensson were absent and it would be impossible for Svensson to achieve

compliance. (*Homer White, Inc. v. United States,* 281 F. Supp. 436 (D.N.Y. 1968).

The power of the Commission to invalidate certificates issued as a result of fraud, misrepresentation, mistake or inadvertence or, as here, improvidently issued because of deliberate concealment of the unlawful common control relationship, is well established, and no further argument on the question is required.

But even if the Commission had acted in excess of its jurisdiction in 1968 in declaring the Svensson certificate of registration invalid, that circumstance would not be material insofar as the Commission's determination in its 1972 decision that Svensson lacked fitness is concerned. As earlier noted, Svensson continued to conduct operations in interstate commerce after the issuance of this Court's *per curiam* order on October 27, 1969, 396 U.S. 18, affirming the District Court's Judgment of April 1, 1969, 299 F. Supp. 712 (J.S. App. D), until January 15, 1970 (when Svensson received temporary operating authority from the Commission) despite the advice of counsel to the contrary (J.S., App. B, p. 5b). Section 207 provides that before an applicant can be issued a certificate of public convenience and necessity he must show, *inter alia,* that he is fit, willing and able to conform to the applicable provisions of the Act and the requirements, rules and regulations of the Commission thereunder. An order issued by a tribunal having jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings. *United States v. United Mine Workers of America,* 330 U.S. 258, 293, 91 L. Ed. 884, 67 S. Ct. 677 (1947). The Commission had subject-matter and *in personam* juris-

diction in the proceedings which led to its 1968 decision. Svensson's callous disregard of the Commission's determination, whether right or wrong, that the certificate of registration was void, particularly after having been affirmed by the District Court and this court, clearly reflects an unwillingness on the part of Svensson to conform to the Act and the requirements, rules and regulations of the Commission thereunder. Therefore, the Commission made no error in its 1972 decision in basing its finding of Svensson's unfitness in part upon its earlier determination that Svensson's certificate of registration was void.

4.2. The District Court Correctly Applied the Doctrine of Res Judicata.

In its 1968 decision affirming the order of the Commission which held the Svensson certificate of registration invalid, the Arizona District Court stated as follows:

> "Based upon our examination of the record before the Commission in the light of the authorities cited by the parties, we are satisfied that the Commission followed the law and that its findings are supported by substantial evidence, including inferences reasonably drawn therefrom." (J.S., App. D., p. 2d).

Accordingly, the court below correctly applied the doctrine of *res judicata* when it held that it would not consider an at ack upon a decision involving issues raised or which should have been raised in prior adjudications (J.S., App. A, p. 5a).

Of course, the purpose of the doctrine of *res judicata* is to prevent reopening of matters involving the same

parties which have been finally determined, whether or not all possible or available matters were actually litigated before the tribunal making the determination. *Grubb v. Public Utilities Commission,* 281 U.S. 470, 478-479, 74 L. Ed. 972, 50 S. Ct. 374 (1930). The doctrine is applied not only to effect a saving of the court's time but the time and money of the parties—both plaintiff and defendant—as well. *Blonder-Tongue Labs. v. University Foundation,* 402 U.S. 313, 324, 329, 28 L. Ed. 2d 788, 91 S. Ct. 1434 (1971).

Despite procedural irregularities in a proceeding before an administrative agency, not objected to in that proceeding or in a direct attack thereon, the agency's determination is not thereby void or subject to collateral attack, even though the result might have been different had a timely objection been raised. *Calahan Road Improvement Co. v. United States,* 345 U.S. 507, 512, 97 L. Ed. 1206, 73 S. Ct. 803 (1953); *United States v. L. A. Tucker Truck Lines,* 344 U.S. 33, 38, 97 L. Ed. 54, 73 S. Ct. 67 (1952); *Title v. Immigration and Naturalization Service,* 322 F. 2d 21, 22 (C.A. 9-1963).

The fact that a particular issue was not actually litigated in a prior proceeding is immaterial so long as there was full opportunity to litigate it and it was adjudicated by the decree. *Jackson v. Irving Trust Co.,* 311 U.S. 494, 503, 85 L. Ed. 297, 61 S. Ct. 326 (1941); See also: *Chicot Co. Drainage Dist. v. Baxter State Bank,* 308 U.S. 371, 375, 84 L. Ed. 329, 60 S. Ct. 317 (1940).

Appellants do not assert, nor could they properly do so, that they were denied a fair hearing in the proceeding before the Commission which led to the 1968 order

or that they were there prevented from raising their contentions with respect to the applicability of Section 212(a). The fact that they neglected to present that argument is clearly no basis upon which to permit a collateral attack upon the Commission's determination as affirmed by the District Court and this Court.

The thrust of appellants' primary argument here (J.S., pp. 10-13) is: that a judgment or an order of a tribunal which acts in the absence of jurisdiction, in the sense of not having the power to so act, is void and may be collaterally attacked; that the action of the Commission in its 1968 decision, declaring the Svensson certificate of registration invalid, was in excess of the Commission's jurisdiction; and that, therefore, the Court below erred in holding that the Commission's 1968 determination was not subject to collateral attack.

These appellees do not dispute that the cases cited by appellants support their major premise. However, as noted in the first portion of the argument, the Commission clearly had jurisdiction to declare the subject certificate invalid, so that the minor premise of appellants' syllogism thereby falls, and with it the conclusion.

Appellants also assert that the present proceeding involves a new cause of action. Such is not the case. Rather, appellants have only raised a new contention which they failed to raise in the prior proceeding. The "thing adjudged" by the Commission in its 1968 decision was that the Svensson certificate of registration was improvidently issued and void *ab initio.* This, in turn, was based upon the Commission's finding that the express conditions precedent to the issuance of a certificate of registration as set forth in Section 206(a)(7)(A) were absent because of the existence of the unlaw-

ful common control relationship as of October 15, 1962 and immediately prior thereto. Furthermore, as earlier noted, those facts could not have been eradicated by following the procedures set forth in Section 212 (a). Applying appellants' logic to this situation it could just as well be said that the Commission was without jurisdiction to issue the certificate of registration in the first instance, and that *that* action on the part of the Commission was thereby void.

Appellants also suggest, citing *Grose v. Cohen,* 406 F. 2d 823 (C.A. 4-1969) that it would be unjust to bar them from collaterally attacking the Commission's 1968 decision. But where is the injustice? Unlike the circumstances in the *Grose* case, the Commission's 1968 determination was appealed all the way to this Court and appellants were represented throughout the proceedings by competent counsel experienced in regulatory matters.

One further point: this is not, as appellants suggest (J.S., 14), a matter of applying *res judicata* "in the administrative law context" only; it also involves the application of *res judicata* to a prior judgment of the District Court, affirmed by this Court.

Manifestly, the Court below correctly applied the doctrine of *res judicata* and no substantial question on the issue justifying further argument before this Court has been presented.

4.3. There Is No Conflict Between Districts.

In one of the earliest cases decided by the Commission after passage of Part II of the Interstate Commerce Act, *Pan-American Bus Lines Operation,* 1 M.C.C. 190 (1936), quoted in *Barrett Mobile Home*

Transport, Inc. v. United States, 381 F. Supp. 1317 (D. Minn. 1973), the Commission set forth the criteria for determining whether the public convenience and necessity require a proposed operation as follows:

> "[W]hether the new operation or service will serve a useful public purpose, responsive to a public demand or need; whether this purpose can and will be served by existing lines or carriers; and whether it can be served by applicant with the new operation or service proposed without endangering or impairing the operations of existing carriers contrary to the public interest." (1 M.C.C. at 203).

In the *Barrett* case, it was clear from the Commission's report that evidence of the applicant's temporary authority operations was considered by the Commission solely as to the third criterion, namely, competitive effect on the operations of existing carriers, to the exclusion of the remaining criteria, and the Minnesota District Court quite properly remanded the matter to the Commission for further consideration. Because there is no indication here that the Commission considered Svensson's operations under temporary authority *solely* as to their competitive effect on the operations of these appellees and other existing carriers, there simply is no conflict between the *Barrett* decision and that of the Court below.

Moreover, unlike the circumstances in the *Barrett* case, the computer study of Svensson's operations referred to in J.S., p. 17, footnote 2, was tendered to the Commission *after* the issuance of its decision of October 17, 1972 (J.S., App. B) when appellants filed with the Commission on Jaunary 22, 1973 their peti-

tion seeking further oral argument, receipt of additional evidence and/or hearing, which petition, among others, was considered by the Commission in its Corrected Order of April 30, 1974 (J.S., App. C). In the latter order, as noted by the court below, the Commission found that, whereas receipt of such evidence into the record appeared warranted, receipt *and consideration* of such data did not warrant a conclusion contrary to that reached in its report and order of October 1972.

As this Court has repeatedly held, action by the Commission in connection with a petition for further hearing and receipt of additional evidence is a matter of discretion (the discretion of the Commission and not of the reviewing court) and will not be disturbed except on a showing of the clearest abuse of that discretion. *United States v. Pierce Auto Freight Lines,* 327 U.S. 515, 535, 90 L. Ed. 821, 66 S. Ct. 687 (1946); *Interstate Commerce Commission v. Jersey City,* 322 U.S. 503, 88 L. Ed. 1420, 64 S. Ct. 1129 (1944); *United States v. Interstate Commerce Commission,* 396 U.S. 491, 24 L. Ed. 2d 700, 90 S. Ct. 708 (1970); *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.,* 419 U.S. 281, 42 L. Ed. 2d 447, 95 S. Ct. 438 (1974). No such abuse of discretion has been shown here.

5. Conclusion.

As the Court below correctly determined, the findings and conclusions set forth in the Commission's report and order of October 1972 have a rational basis and are supported by substantial evidence of record. *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., supra,* 419 U.S. 281 (1974). Further,

the Commission's action on the subsequently filed petition in making its Corrected Order of April 1974 was a proper exercise of its discretion. It is manifest that appellants have not presented any substantial question which justifies further argument before this Court, and the judgment of the District Court should be affirmed.

Respectfully submitted,

R. Y. SCHUREMAN,
Attorneys for Appellees, Milne Truck Lines, Inc., Navajo Freight Lines, Inc., O-N-C Freight System, Thunderbird Freight Lines and Western Gillette, Inc.

Of Counsel:
RUSSELL & SCHUREMAN.

APPENDIX.

Portion of Report and Recommended Order of Joint Board No. 47 Adopted by the Interstate Commerce Commission, Division 3, as Its Own in Svensson Freight Lines — Purchase — Haywood Washum, 104 M.C.C. 838 at 848-851.

Svensson Freight Lines, an Arizona corporation, has been engaged as a motor common carrier in Arizona intrastate commerce, and interstate and foreign commerce, continuously for a period of years dating back prior to 1957. Until the amendment to section 206(a) (6) and (7) of the act, effective October 15, 1962, it conducted such operations under the exemption established in section 206(a) (6) (sic) of the act, and since June 5, 1963, it has conducted interstate and foreign operations under a certificate of registration issued to it in docket No. MC-96786 (Sub-No. 1), pursuant to the provisions of section 206(a) (6) and (7) of the act.

In June or July 1957, the defendant Don Washum and his cousin James Eldree Washum each purchased 50 percent of all of the issued and outstanding stock of the defendant Svensson from its previous shareholder Guss Svensson. Funds were borrowed from the First National Bank of Yuma to meet the down payment required by Guss Svensson to discharge certain pressing obligations of Svensson. The note issued by James Eldree Washum and Don Washum to the First National Bank of Yuma was consigned (sic) by the defendant Haywood Washum, father of the defendant Don Washum.

The defendant Haywood Washum and his brother Jim Washum were copartners doing business as Los

Angeles-Yuma Freight Lines. They purchased a certificate of public convenience and necessity issued in docket No. MC-14045 from one James M. Clint, which purchase was consummated on October 1, 1956. Jim Washum is the father of James Eldree Washum. On January 22, 1963, Jim Washum transferred all of his interest in Los Angeles-Yuma Freight Lines to Haywood Washum and since that date Haywood Washum has held the certificate issued in docket No. MC-14045 as a sole proprietor. At about the same time that defendant, Haywood Washum, acquired the interest of his brother in LAY, the defendant, Don Washum, acquired the stock interest of his cousin James Eldree Washum in Svensson. Thus, since on or about January 21, 1963, the certificate of LAY has been held by Haywood Washum as a sole proprietor and all of the issued and outstanding stock of Svensson has been held by his son Don Washum. Defendant Don Washum was a vice president of Svensson continuously from June or July 1957 to on or about January 21, 1963, when he became president of the corporation upon acquiring the interest of his cousin. He has continued to be president of Svensson since on or about January 21, 1963.

The LAY certificate issued in docket No. MC-14045, attached hereto as "appendix A," authorizes the transportation of general commodities, with specified exceptions, between Los Angeles, Calif., and Yuma, Ariz., including certain immediate and off-route points. The Svensson certificate of registration, attached hereto as "appendix B", authorized the transportation of general commodities between various points and places in the State of Arizona. Included within its operating authority is authority to transport truckload lots from Phoenix to Yuma, Ariz., when a

portion of the load is destined to points in Roll and the Mohawk Valley area, as described in the certificate of registration. The Mohawk Valley area and Roll are located between Phoenix and Yuma, Ariz.

Since July 1957, the defendant Svensson, has provided a continuous and regular service in the transportation of general commodities in interstate or foreign commerce between Yuma and Phoenix, Ariz., in both directions. This traffic has been handled almost exclusively in interline service with LAY. Traffic handled in interline service between Svensson and LAY has consisted predominantly of traffic originating at or destined to Los Angeles, Calif. This has resulted in a joint-line service between Phoenix, Ariz. and Los Angeles, Calif.

Since July 1957, both LAY and Svensson have utilized a joint terminal at Yuma, Ariz., for the conduct of their operations. The terminal of LAY in Los Angeles, Calif., has been utilized by it exclusively in its own operations. Svensson has continuously maintained a terminal in Phoenix, Ariz., since at least July 1957. The present joint Yuma terminal of defendants Svensson and LAY is owned by Haywood Washum and his wife though prior to 1963 Haywood Washum and his wife owned the property jointly with Jim Washum and his wife.

Both Svensson and LAY maintain a telephone listing in the Phoenix Metropolitan Classified Telephone Directory which is the same number. Svensson and LAY maintain different telephone listings in the Yuma-Winterhaven-Somerton Classified Telephone Directory, but that said directory shows the Svensson telephone number as the one to be called in Phoenix, Ariz. (sic) to reach LAY and H. L. Washum & Son. H. L. Washum & Son

is a carrier engaged in the transportation of cattle in Arizona intrastate commerce pursuant to a certificate issued to it by the Arizona Corporation Commission. A verified application for renewal of the certificate filed by Haywood Washum with the Arizona Corporation Commission on May 2, 1963, reflects that the operation is a copartnership consisting of H. L. Washum and Donald L. Washum (defendants herein).

From 1957 to the date of hearing on the Complaint herein, Svensson has conducted its operations, in part, with motor vehicle equipment leased from LAY. Where there has been sufficient traffic, through trailers owned by LAY have been utilized between Phoenix, Ariz., and Los Angeles, Calif., to provide through service, otherwise the traffic has been rehandled at the Yuma joint terminal facility. Ninety-five percent of the traffic interlined by LAY at Yuma, Ariz., has been with Svensson, and pickups and deliveries have been and are made in the Yuma area interchangeably with the pick-up and delivery equipment of each depending upon their respective operating convenience. Svensson and LAY have maintained a single teletype system between Phoenix, Ariz., and Los Angeles, Calif., with teletype facilities also at Yuma, Ariz., in their joint terminal. At all times since August 26, 1957, the defendants Svensson and LAY (including the prior partnership of Haywood Washum and Jim Washum) have maintained a master policy of insurance covering the operations of Svensson, LAY, and H. L. Washum & Son (including the predecessor partnership Washum Brothers). Don Washum and his father Haywood Washum have utilized one desk at Yuma, Ariz., for the conduct of the operations of Svensson and LAY though each have separately employed office and dock personnel. Since approximately 1957 Svensson and LAY have maintained joint through rates in the tariffs of the Interstate Freight Carriers' Conference on traffic moving between Los Angeles, Calif., and Phoenix, Ariz., and various intermediate and off-route points. Also, both Svensson and LAY, for a number of years, have utilized common shop facilities at their joint terminal in Yuma, Ariz.

On February 4, 1963, the defendant Svensson filed a BOR-99 Application with the Commission, verified by the defendant Don Washum, as its president, for a "grandfather" certificate or registration in docket No. MC-96784 (Sub-No. 1). The appendix "A" to the BOR-99 Application listed one Verlan Lee as vice president of Svensson. Verlan Lee now serves as the dock foreman of LAY though he continues to be the vice president of Svensson.

On January 12, 1964, the defendant Don Washum addressed a letter to a Los Angeles law firm offering to dispose of the Svensson and LAY operations and operating properties. The letter is on the stationery of Washum Brothers and Los Angeles-Yuma Freight Lines. The second paragraph thereof is particularly pertinent to the within Complaint Proceeding. It reads as follows:

> "We have a combination of companies which is now serving points between Los Angeles and Phoenix, Ariz. This consists of 'Washum Bros,' a cattle company, 'Los Angeles-Yuma Freight Lines' and 'Svensson Freight Lines.' LA-Yuma has two California Intrastate Permits and it's ICC Permit serving LA to Yuma and all intermediate points including Calexico, California. Svensson is an intrastate carrier with ICC Registrations serving points between Yuma & Phoenix."